Opening Remarks by Mr. Justice Marshall Rothstein to Ad Hoc Committee to Review a Nominee for the Supreme Court of Canada, February 27, 2006

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Thank you, Mr. Minister, and thank you for your generous remarks about me.

Mr. Minister, members of the committee, Professor Hogg, ladies and gentlemen, there's a lot of interest in this new process. There are a lot of people here, and the media are here. When I make a public presentation to judges or lawyers, they aren't usually that interested in what I have to say. On the contrary, very often when I give a presentation at a conference, it is toward the end of the day when people are filing out and not many people are left in the room.

I have to tell the story about the speaker at a conference who got up towards the end of the day. People were filing out, and eventually there was only one person left in the room. The speaker said, "I really appreciate your staying. I did a lot of work to prepare, and my topic must be of great interest to you." The guy responded, "Are you kidding? I'm the next speaker." Well, there's no fear of that here today.

This is a process to fill the vacancy created by the retirement of Mr. Justice Jack Major. I knew Justice Major when we were both still in practice. He was a superb lawyer.

We appeared on the same side of a case in the Supreme Court of Canada in the late 1980s. We lost. He didn't say much at the time, but a few weeks later he sent me a paper by an American professor, entitled "The Art of Advocacy". Coming immediately after the loss in the Supreme Court, I didn't think his sending me the paper was just a random act of kindness. Justice Major was a common-sense, clear-thinking judge. He was what lawyers and judges refer to as "the reasonable man". He has a great dry wit, and he wrote clear and mercifully short, succinct judgments. His shoes will be hard to fill.

Mr. Chairman, you have explained that six candidates were referred to the advisory committee established to make recommendations to the government to fill Justice Major's vacancy. The committee narrowed that list to three candidates. As the pilot tells you when you fly, he knows you have options and he appreciates that you chose his airline. Mr. Chairman, I know the Prime Minister had options, and I appreciate that he nominated me to fill the vacancy created by Justice Major's retirement.

I'm humbled by the confidence that the Prime Minister has demonstrated in my nomination. If after this process he confirms the nomination, I will do my utmost to be worthy of the trust he has placed in me on behalf of the people of Canada.

I want to begin by telling you how I think I got here, not by saying that I walked over, but by telling you something of my background. Then I'll have a few remarks to make about my view on the role of the judge.

My parents were from Eastern Europe, my father from Poland and my mother from Byelorussia. They were part of that great wave of immigration that populated western Canada prior to World War I, my father to Yorkton, Saskatchewan, and my mother to Winnipeg. My father did accounting work and later was a merchant; my mother was a schoolteacher. Neither had university

educations.

I was an only child, and as far back as I can remember, the one message that was drummed into my head was that I had to go to university. There was never any doubt about that. My father desperately wanted me to be an actuary, but he had to settle for a lawyer. When I was in university, I worked during the summer as a waiter on the CPR dining car between Winnipeg and Vancouver.

At this point, two of my sons, who are here today, are leaning over to each other and groaning, "Oh no, he's not going to tell them a dining car story." Well, yes, Doug and Bo, I will, but I'll be brief.

I often say that I learned more about life working in the dining car than anywhere else. Working for 36 to 48 hours at a stretch in close quarters with nine or ten other people from different backgrounds, different education levels, and different prejudices is not always easy. You had to be flexible and accommodating or you couldn't survive. You had to be scrupulously honest about pooling your tips or you couldn't survive. It was long days on your feet; it was hard physical work. When I screen law clerk candidates, I always look to see whether they have had to do some hard physical work so they will appreciate what I have come to appreciate: the diversity of our population, how hard Canadians have to work to make ends meet, and something of what it's like not to have the advantages they will have as lawyers

When I went to law school at the University of Manitoba, we had to go to law school in the morning and article concurrently in the afternoon for four years--school in the morning, articling in the afternoon. While I had many fine teachers, Cliff Edwards, who later became the dean and chairman of the Manitoba Law Reform Commission and is still at the law school, particularly stands out as a great teacher. He brought dry and sometimes esoteric subjects to life. He sparked my interest in the law.

I was articled to Arthur Mauro. Art Mauro's name will be known to people in Winnipeg and elsewhere. Among other things, Art is an Officer of the Order of Canada, and until recently he was chancellor of the University of Manitoba.

I always tell my kids that hard work will make them competitive unless they come up against someone is smarter than they are and who also works hard. Well, that was Art. I learned many things from Art, but the most important thing I learned was hard work and preparation. He would say that you win cases in the library and not in the courtroom, and he would spend hours preparing. His cross-examinations and his arguments were masterful, and the standard he set was the highest. That was a good foundation for me to follow in later years.

When I started in practice in 1966, I did a little bit of everything. One of my colleagues recently told me that meant I was a door lawyer--I took anything that came through the door. But Art Mauro had been a transportation lawyer and I wanted to follow in his footsteps. When Art left the practice of law in 1969 to go into business, my partner, Jim Foran, and I decided to see if we could pick up the pieces and carry on that practice. Slowly over the 1970s we did, with Jim concentrating on trucking, me concentrating on air law, and both of us working on railway cases.

By the late 1970s, transportation law occupied the vast majority of my time. During the 1980s, governments were deregulating the transportation industry and there was a new emphasis on competition, so the regulatory work I had been doing, at least in part, became competition work. From the mid-1980s I began to do work in the competition field, as well as my traditional transportation practice.

As the minister has told you, from time to time I have been asked to chair adjudications under the Manitoba Human Rights Code and the Canadian Human Rights Act. I was also asked on occasion to be the neutral chairman in labour arbitrations. This was not a major part of my practice, but it did

introduce me to the world of adjudication.

In the early 1990s, a couple of judges in Manitoba suggested to me that I should apply to become a judge. In late 1991 I did make application to join the Federal Court. My transportation and competition work was before federal tribunals, and appeals were in the Federal Court of Appeal, so the Federal Court was the natural court for me to want to join.

I was appointed a judge of the Federal Court trial division in June 1992. The first year or so was difficult. I was introduced to laws and issues that I knew nothing about: immigration, aboriginal, income tax, access to information, environmental, and intellectual property, among others. But as with all things, one gains knowledge and experience, and the work becomes more manageable and enjoyable.

In 1993 I was appointed to the Competition Tribunal, which brought me into a territory I had been familiar with in practice.

In 1999 I was appointed to the Federal Court of Appeal. The exposure here is quite different from that in the trial division. The appeal court sits in panels of three, so I wasn't the boss anymore. The work is collegial. I couldn't take up all the time asking my own questions; I had to leave some time for my colleagues.

Usually a panel of judges sees cases the same way, but I have come out of court absolutely certain that I had the answer and have then been convinced by my colleagues to change my mind, or the other way around. Occasionally we agree to disagree, and then there is a dissenting judgment.

I can't conclude this portion of my remarks about how I got here without mentioning my wife, Sheila. She is working this afternoon, but she instructed me to be sure to tell you that I wouldn't be here today without her.

Seriously, for many reasons I wouldn't be here without her. One is that my practice required that I be out of Winnipeg for much of each year, and Sheila largely raised our kids.

Let me turn to my views on the role of a judge.

It goes without saying that judges must be neutral arbitrators in disputes that come before them. They can have no personal agenda and they must be independent.

We know that judicial independence in some other parts of the world is not something people can rely upon, but a cornerstone of a free and democratic society is an independent judiciary. Nowhere is that independence more important than in cases between the government and the individual. My courts, the Federal Court and the Federal Court of Appeal--and indeed, all courts--are regularly deciding cases between governments and another party, and that independence is of the most fundamental importance.

Judges are subject to constraints. I will explain. As neutral arbitrators, we are to interpret and apply the law to the facts of each case. Canada is a federation in which Parliament and the provincial legislatures make the laws. When Parliament or the legislatures have conferred a discretionary power on judges, that discretion must be exercised within the bounds established by the legislatures or Parliament, and judges are required to conduct court proceedings in accordance with well-established rules of procedural fairness.

Our judicial system operates on the basis of precedent. We follow the interpretations that our predecessors have developed. We don't follow them slavishly; if it can be demonstrated that a prior decision was clearly in error or that intervening cases have attenuated the validity of a prior

decision, we may depart from it. But the obligation of judges is to maintain the consistency, stability, and predictability of the law. Therefore, we abide by precedent.

Lower court decisions may be appealed to higher courts. Our hierarchical system ensures a review mechanism for important legal questions. As I said earlier, appeal courts and the Supreme Court of Canada operate on a collegial basis. Three judges sit in a court of appeal. Five, seven, or nine judges sit in cases in the Supreme Court. So individual judges must be open to the views of their colleagues.

All of this is to say that the role of the judge is subject to constraints, and judges must have the modesty and the humility to understand that.

So far I have not alluded to the Constitution or the Canadian Charter of Rights and Freedoms. From the beginning, in 1867, Canada has had a written Constitution. Originally it was the British North America Act. The laws enacted by Parliament or the legislatures were subject to the Constitution. When I went to law school, constitutional law was all about sections 91 and 92 of the BNA Act and the division of powers between the federal and provincial governments, and when laws were found to be ultra vires, they were struck down. Since the advent of the charter in 1982, laws enacted by Parliament and the legislatures have been struck down by the courts where laws were found to violate a provision of the charter.

So judges have a role to play in a constitutional democracy. When the issue is raised in litigation before them, judges must decide whether the laws enacted by Parliament or the legislatures conform to the Constitution and the charter. If the laws do not, the courts have been given the jurisdiction to strike them down.

This doesn't mean that judges have some kind of upper hand over Parliament or the legislatures. They are not a law unto themselves. Constitutional or charter cases must still be decided having regard to legal principles, and because these cases are important and have widespread effect, the Supreme Court hears some of them. So they are reviewed usually by three courts before any final decision is made.

In the case of the charter, section 1 provides that even a law that is found not to conform with the charter may be saved if justified in a free and democratic society, and section 1 is applied according to a developed formula of analysis. Courts must consider whether the challenged law minimally impairs a charter right.

Minimal impairment is not a hypothetical or theoretical minimum that is impossible to achieve; it is considered in a practical context. If the law falls within a reasonable range of alternatives, it will meet the minimal impairment test. The courts must be mindful that they are being asked to strike down a law that has been enacted by a democratically elected majority of legislators. When laws are struck down, the courts must preserve the intent of the legislature or Parliament to the extent possible. The least intrusive approach must be adopted.

So even in the interpretation and application of the Constitution and the charter to the laws passed by Parliament and the legislatures, judges are constrained. A judge must understand and respect those constraints.

As a judge, I know we have an obligation to work to maintain public confidence in our courts by protecting the integrity and independence of our courts. I will work hard to contribute to those objectives.

I recognize that my not being bilingual and my being educated in a common law jurisdiction will require a greater effort on my part to hear and decide cases argued in French and involving the civil law.

I said that I believe judges are independent and impartial arbitrators and that I have no agenda, but I do have a commitment. If my nomination is confirmed by the Prime Minister, I will approach each case with an open mind, ready to hear and understand the arguments made, to consider the views of my colleagues, and to decide, based upon law, to the best of my ability.

Thank you, Mr. Chairman. I am ready to answer questions from the committee.

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